Supreme Court of the United States

No. 72-922

Mary Louise Green Paschall,
et al.,

Appellants,

v.

Christie-Stewart, Inc., et al.

APPEAL from the Supreme Court of the State of Oklahoma.

The statement of jurisdiction in this case having been submitted, and considered by the Court, probable jurisdiction is noted.

72-922

DEC 26 1972

MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. ———

MARY LOUISE GREEN PASCHALL, ET AL.,
Appellants,

VERSUS

CHRISTIE-STEWART, INC., ET AL.,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

JURISDICTIONAL STATEMENT

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In the
Supreme Court of the United States
OCTOBER TERM, 1972

No. ———

MARY LOUISE GREEN PASCHALL, JAN PASCHAL HARDEN, JOHN N. PASCHALL, JR., H. GRADY ROSS and ZELDA DANNA PASCHALL,

Appellants,

VERSUS

CHRISTIE-STEWART, INC., a corporation, R. W. GARRETT and R. H. VAUGHN,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

JURISDICTIONAL STATEMENT

Appellants, Mary Louise Green Paschall, Jan Paschal Harden, John N. Paschall, Jr., H. Grady Ross and Zelda Danna Paschall, submit their statement disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the Supreme Court of Oklahoma in Case No. 43,907, reversing a judgment of the Court of Appeals, Division No. 2, of the State of Oklahoma, and affirming the judgment of the Trial Court.

THE OPINIONS BELOW

The Opinion of the Oklahoma Supreme Court has not yet been reported. The Opinion of the Oklahoma Court of Appeals, Division No. 2, was not reported. Copies of both Opinions are attached hereto as Appendix A. In addition, the Trial Court journal entry of judgment is appended as Appendix B.

JURISDICTION

1. This is an appeal from a decision of the Supreme Court of Oklahoma reversing a judgment of the Court of Appeals, Division No. 2, of the State of Oklahoma and affirming the judgment of the Trial Court that a Resale Tax Deed executed in 1956 by Seminole County, Oklahoma officials was valid and conveyed to Appellees Garrett and Vaughn, the full fee simple title to forty acres of land, including the mineral rights owned of record by the predecessors in interest of Appellants. The tax sale was conducted under the procedures established in 68 Okla. Stat. 1951, § 381, et seq. then in effect, and Appellants here challenge, and have challenged throughout the proceedings of this case, the adequacy of the notice of such tax sale as required by such statute to be given to Appellants or their predecessors in interest as owners of previously severed mineral rights, consistent with the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of Oklahoma handed down its Opinion on September 26, 1972. The Notice of Appeal to this Court was filed by Appellants with the Clerk of the Supreme Court of Oklahoma on December 8, 1972.

3. The jurisdiction of this Court upon appeal is conferred by 28 U.S.C.A., § 1257(2). With respect to Appellant's challenge of the validity of the above mentioned state statute in relation to the notice requirements thereof, on the ground that as applied to the taking of their mineral rights under the Resale Tax Deed such state statute is repugnant to the Constitution of the United States, the decision of the highest court of the state was in favor of its validity.

4. Cases believed to sustain the jurisdiction of this Court on appeal include *Mullane* v. *Central Hanover Bank & Trust Company*, 339 U.S. 306, 70 Sup.Ct. 652, 94 L.Ed. 865 (1950); *Covey* v. *Town of Somers*, 351 U.S. 141, 76 Sup.Ct. 724, 100 L.Ed. 1021 (1956); *Walker* v. *City of Hutchinson*, 352 U.S. 112, 77 Sup.Ct. 200, 1 L.Ed.2d 178; and *Wisconsin E.P. Co.* v. *City of Milwaukee*, 352 U.S. 948, 77 Sup. Ct. 324, 1 L.Ed.2d 241 (1956).

5. Because of the interrelationship between the "Original Sale" and the "Resale" under Oklahoma statutory law and decisions, we quote below the notice provisions of the tax sale statutes for both stages of the procedure, although the judgment appealed from applies only to a Resale Deed:

68 Okla. Stat. 1951 §382
(Original Sale)

"The treasurer shall give notice of the sale of real property for delinquent taxes by publication thereof once a week for three consecutive weeks, commencing after the first day of October, preceding the sale, in some newspaper in the county, to be designated by the board of county commissioners, and if the board of county commissioners shall fail to designate such

paper, then in a paper to be selected by the treasurer. Such notice shall contain a notification that all lands on which the taxes of such fiscal year remain due and unpaid will be sold, and of the time and place of the sale, and shall contain a list of the lands to be sold and the amount of taxes due. The county treasurer shall charge and collect in addition to the taxes, interest and penalty the sum of twenty-five cents on each tract of real property other than town lots, and ten cents on each town lot advertised for sale, which sum shall be paid into the county treasury, and the county shall pay the cost of the publication of such notice. But in no case shall the county be liable for more than the amount charged to the delinquent lands for advertising. R.L. 1910, §7397."

68 Okla. Stat. 1951 §432b
(Resale)

"The County Treasurer shall give notice of the resale of such real estate by publication thereof once a week for four consecutive weeks preceding such sale, in some newspaper, having been continuously published one hundred four (104) consecutive weeks with admission to the United States Mails as second class mail matter, with paid circulation and published in the county where delivered in the mails in the county to be designated by the Treasurer; and if there be no paper published in the county, or publication is refused, he shall give notice by written or printed notice posted on the door of the courthouse. Such notice shall contain a description of the real estate to be sold, the name of the owner of said real estate as shown by the last tax rolls in the office of the County Treasurer, the time and place of sale, a statement of the date on which said real estate was sold to the county for delinquent taxes, the year or years for which taxes have been assessed but remain unpaid, and that the same has not

been redeemed for the period of two years from the date of sale, the total amount of all delinquent taxes, costs, penalties and interest accrued, due, and unpaid on the same, and that such real estate will be sold to the highest bidder for cash. It shall not be necessary to set forth the amount of taxes, penalties, interest and costs accrued each year separately, but it shall be sufficient to publish the total amount of all due and unpaid taxes, penalties, interest and costs. Laws 1939, p. 546, §3; Laws 1941, p. 338, §1."

STATEMENT OF QUESTIONS

1. Whether the notice requirements of the tax sale tutes of the State of Oklahoma in effect at the time of purported taking of the mineral rights of Appellants e under consideration (68 Okla. Stat. 1951, §381 et seq.) re repugnant to the Due Process Clause of the Fourth Amendment to the Constitution of the United States, decision of the Supreme Court of Oklahoma being in or of validity of such state statutes.

2. Whether adequate notice of an Original Tax Sale a Tax Resale was given Appellants or their predecesas owners of previously severed mineral rights under ls in the State of Oklahoma, consistent with the Due cess Clause of the Fourteenth Amendment to the Conition of the United States, the decision of the Supreme rt of Oklahoma being that notice given was adequate.

STATEMENT OF THE CASE

At the times here involved, John N. Paschall and Walter B. Paschall, Jr., were the record owners in equal shares of an undivided 15/16 mineral rights and H. Grady Ross owned the other undivided 1/16 mineral rights under the SW/4 NW/4 of Section 28-9N-7E, Seminole County, Oklahoma. The surface was separately owned and the above named mineral owners had no interest in the surface. Appellants are successors in interest to the above named mineral owners.

The surface owner failed to pay the ad valorem taxes for the year 1952, and the County Treasurer included the land in the Original Sale on the first Monday of November, 153. Publication notice thereof was given in accordance with the applicable statute (68 Okla. Stat. §382), none of the owners of interests in the land being named therein. No personal notice to the above named mineral owners was served upon them nor was there posting of notice on the land or elsewhere or mailing of notice to such mineral owners. The statutes did not require any such notice other than publication in the manner actually conducted. Seminole County became the purchaser at such Original Sale.

The land remained unredeemed and after two years was included in the Resale conducted on the second Monday in May, 1956. Notice of the Resale was given by publication in accordance with the applicable statute (68 Okla. Stat. §432b), only the surface owner being named therein. No personal notice to the above named mineral owners was served upon them nor was there posting of notice on the land or elsewhere or mailing of notice to such mineral own-

ers. The statutes did not require any such notice other than publication in the manner actually conducted. At such Resale, Otis Garrett was the successful bidder and the Resale Deed was made out to R. W. Garrett and R. H. Vaughn, who now claim the entire interest in the land including all the mineral rights.

A certified transcript of all the above mentioned tax sale proceedings on file in the office of the County Treasurer has been admitted in evidence in this case. The parties have stipulated that the above named mineral owners received no actual notice of either the Original Sale or the Resale. Walter B. Paschall, Jr., died testate in the year 1965, and John N. Paschall died testate in the year 1966, and their respective devisees have been substituted as parties.

In the year 1963, the plaintiff in this action, Christie-Stewart, Inc., purchased an oil and gas lease from Mr. Garrett and Mr. Vaughn. Later, a separate lease was purchased by the same lessee from Walter B. Paschall, Jr., and John N. Paschall, and another from H. Grady Ross. Mr. Vaughn testified that no other lease had been previously executed by the tax sale purchasers, that they had conducted no previous exploration for oil, gas, or other minerals on the land, and that no production had been established in the interim between the tax sales of 1953-1956 and the leasing to Christie-Stewart, Inc. In order to determine that they had valid leasehold coverage prior to drilling a well on the land, Christie-Stewart, Inc., filed this action and an order of the Trial Court was thereafter entered quieting the oil and gas leasehold title in that corporation but reserving for future consideration the question of which set of claimants had title to the mineral rights

and, consequently, which oil and gas lease was valid and which was void.

A well was drilled by Christie-Stewart, Inc., in 1965, and production was established which has continued to the present time. Royalties have been suspended by the purchaser of the production pending determination of the owners of the mineral rights, *i.e.*, as between Mr. Garrett and Mr. Vaughn on the one hand and the Paschall devisees and Mr. Ross on the other. It is this question that the District Court of Seminole County, Oklahoma, was asked to decide and this turns on the validity of the taking of the mineral rights under the Original Sale of 1953 and the Resale of 1956. The Trial Court entered its Judgment on November 3, 1969, that the Resale Tax Deed of 1956 was valid and conveyed the full fee simple title including the mineral rights here in dispute (Appendix B).

It is the position of the Paschall devisees and H. Grady Ross, and has been since the inception of this litigation, that the tax sale proceedings in both the Original Sale of 1953 and the Resale of 1956 failed to include the essential element of constitutional notice to the then owners of the mineral rights, a separate and severed property interest. Such property owners were thereby denied due process of law, and therefore the purported taking of their property was void *ab initio*.

The federal questions stated above were raised in the Trial Court by Amendment to Answer filed by Appellants, and argued and briefed in the Trial Court (Transcript of Trial Court Proceedings, pages 18 and 19) and adversely ruled upon by the Trial Court. These federal questions were thereafter the basis of the appeal Brief of Plaintiffs in

Error and decided in favor of Appellants by the Oklahoma Court of Appeals, Division No. 2, the opinion (Appendix A) dealing specifically with such questions. Thereafter, the Supreme Court of Oklahoma again reviewed the case and reversed the judgment of the Oklahoma Court of Appeals on the specific federal questions stated above, affirming the judgment of the Trial Court (Appendix A).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Appellants were the owners of the entire severed mineral interest in the land with no ownership in the surface. Under Oklahoma law, severed mineral interests are separate property rights, but the owners thereof have no duty to pay ad valorem taxes, that duty falling exclusively upon the owner of the surface. At the Original Sale, only publication notice was given and no names of owners were included in the notice. At the Resale, only publication notice was given and only the name of the surface owner was recited in the notice. The statutory requirements of notice of the Resale, 68 O.S. 1951 §432b, required inclusion of the "name of the owner of said real estate." Thus, as to the mineral owners, the statutory procedure itself was not effectively followed. Their separate property interests were not accorded due process of law, even under the Resale statute. Furthermore, this manner of notification (publication without naming the affected owners) does not adequately fulfill the notice requirements of the United States Constitution because it amounts to no more than a "mere gesture" at notification. It is not a means of notification "such as one desirous of actually informing the absentee

might reasonably adopt to accomplish it"; *Mullane* v. *Central Hanover Bank & Trust Company*, 339 U.S. 306, 70 Sup.Ct. 652, 94 L.Ed. 865 (1950). At no time did the fact of the tax sale ever actually come to the attention of the mineral owners until an offer to purchase an oil and gas lease was made to them and this action was filed against them. Since neither adequate constructive notice was given nor actual notice received, due process of law was not carried out as to the rights of the mineral owners. The tax sale procedure constituted an attempted taking of the mineral owners' property without due process of law.

The Oklahoma statutory tax sale procedure is administrative in nature. It provides in detail the steps to be followed by the county officials who conduct the tax sales. In some steps, the statute sets forth the forms to be used. The notice requirements for each occasion of sale are specified in the statute. It requires no court proceedings to perfect title acquired through the tax sale.

A preliminary review of tax sale requirements of other states shows that numerous states have statutory procedure similar to that of Oklahoma. A wide geographical distribution of those states is indicated, *e.g.* Arizona, Florida, Massachusetts, Idaho, Indiana, Colorado and North Dakota and many others. Another group of states have statutes providing for direct notice to the owners whose property is being taken. Such notice takes various forms: formally served process, mailing by regular mail or in some states by certified mail, or publication notice addressed specifically to the individual owners concerned. Another group of states have statutes which require a fully judicial foreclosure of the tax lien after bringing the owner of the land

into court through normal judicial process. The Oklahoma procedure is an example of the least strict requirements of notice to the owner of the land, especially with regard to Resales by the county after the Original Sale has vested it with the tax title. The Oklahoma Supreme Court has decided that no notice to the severed mineral interest owner is necessary at the Resale (Appendix A). When it is realized that the county acquired its tax title through the Original Sale which requires no naming of the owner in the publicatio notice of sale and also requires no direct notice to the owner, it becomes shockingly obvious that a taking has occurred without due process. Tax sale procedure in other states is similar.

The substantial character of the federal questions raised herein is also illustrated by the numbers and class of owners affected throughout the United States by this type of tax lien enforcement. Page upon page of newspaper listings of property to be sold for taxes occur in many states throughout every year. In the major percentage of instances the taking is from individual persons who are predominately of the lower income group. Thus the impact and detrimental effect of the statutory procedure falls most heavily upon those least likely to be able to defend their property rights, least likely to be actually apprised by the methods of notification used, and least likely to understand the meaning of the notice if by chance it does come to their attention.

CONCLUSION

Appellants respectfully suggest that this appeal brings before this Court federal questions under the Constitution which are far-reaching and important, both in terms of legal principles and of practical impact upon individual owners of real estate throughout the United States, and that the questions are so substantial as to require plenary consideration with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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December, 1972

APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

FILED
SUPREME COURT
OF OKLAHOMA
SEP 26 1972
ANDY PAYNE
CLERK

Christie-Stewart, Inc., a Corporation,
Plaintiff,
vs.
Walter B. Paschall, Jr., and John N. Paschall, et al.,
Defendants,
R. W. Garrett and R. H. Vaughn,
Cross-Defendants.

No. 43,907

FOR OFFICIAL PUBLICATION

CERTIORARI TO THE COURT OF APPEALS,
DIVISION NO. 2

Action by Christie-Stewart, Inc., plaintiff (oil and gas lessee) to quiet title and to determine whether the defendants, the Paschalls and Ross, or the defendants, Garrett and Vaughn, were the owners of the minerals and entitled to the royalties produced under their lease. The trial court, Honorable Bob Howell, Judge, held that defendants, Garrett and Vaughn, acquired title to the minerals under a valid Resale Tax Deed. The Court of Appeals, Division 2, held in favor of the Paschalls and Ross after first finding that the Resale Tax Deed was void for lack of adequate notice and due process. Garrett and Vaughn seek certiorari.

CERTIORARI GRANTED; JUDGMENT OF THE APPELLATE COURT REVERSED; JUDGMENT OF THE TRIAL COURT AFFIRMED.

[APPENDIX]

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Andrews, Mosburg, Davis, Elam,
Legg and Kornfield, Oklahoma City,

Jack Highley,
Highley, Highley and Short,
Oklahoma City, For Defendants, the Paschalls and Ross

Richard S. Roberts,
T. H. Williams, Jr., For Defendants, Garrett and Vaughn.

JACKSON, J.

The question for decision is whether the Oklahoma statutory procedure for the sale of real property for delinquent ad valorem taxes complies with constitutionally adequate notice and due process of law. A brief statement of the facts will explain how the issue arose.

Prior to 1952 the Paschalls and H. Grady Ross acquired by mineral deeds 15/16ths of the minerals in and under a 40 acre tract of land in Seminole County, Oklahoma. The surface owner failed to pay the ad valorem taxes for the year 1952, and pursuant to statute the County Treasurer included the land in the Original Sale on the 1st Monday in November, 1953. Publication notice of the Original Sale was given prior to the sale in the manner provided by the statute. There being no bidders at the Original Sale, Seminole County became the purchaser and acquired a certificate which in legal effect was an ad valorem tax lien.

The 1952 taxes were not paid during the next two years by the surface owner or by the mineral deed holders and, pursuant to statute, the County Treasurer included this land in the Resale conducted on the second Monday in May, 1956. Publication notice of the Resale was given in accordance with the statute prior to the sale and the mineral deed holders, the Paschalls and Ross, did not receive notice of the sale either by personal notice, mailing, or posting. Garrett and Vaughn were the successful bidders

at the Resale and claim a fee simple title. Their bid was in excess of the amount of taxes due and the surface owner received the surplus. He is not a party in this action.

In 1963 Christie-Stewart, Inc. (plaintiff herein) acquired separate oil and gas leases from Garrett and Vaughn and from the Paschalls and Ross. Plaintiff brought this action to quiet title to its leases and to determine whether Garrett and Vaughn acquired title to the mineral rights by their Resale Tax Deed, or whether the mineral rights remained in the Paschalls and Ross. Oil was discovered on the land in 1965 and royalty payments have been suspended pending decision of the ownership of the mineral rights.

The trial court, consistent with our statutes and former decisions of this court, held that the Resale Tax Deed purchasers (Garrett and Vaughn) were the owners of the minerals. The Paschalls and Ross appealed. The Court of Appeals, Division No. 2, relying upon Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865; Walker v. City of Hutchinson, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178; Wisconsin Electric Power Co. v. City of Milwaukee, 352 U.S. 948, 77 S.Ct. 324, 1 L.Ed.2d 241; and New York v. New York, New Haven & Hartford R.R. Co., 344 U.S. 293, 73 S. Ct. 299, 97 L.Ed. 333, concluded that publication was not adequate notice and under the circumstances of this case reversed the trial court.

It is readily apparent that in each of the cited cases the court was dealing with law suits or actions where the statute did not specifically designate the time and place where the action or proceeding would be filed and action taken. In *Mullane* the trustee was required to make an accounting *twelve to fifteen months* after the establishment of the trust fund and *triennially thereafter*. In *Walker* the City could file its condemnation proceeding at its convenience. *Wisconsin Electric Power Co.* involved special assessments for street improvements, and *New York* involved a bankruptcy proceeding. To this list may be added Schroeder v. New York, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed. 2d 255,

89 A.L.R. 2d 1398. See also Due Process in Oklahoma Tax Sales, 20 Okla. Law Rev. at p. 374. In each of the cited cases publication was insufficient notice because it would require a property owner to constantly examine the legal notices contained in newspapers to determine whether his property was in jeopardy. In each of the cited cases the landowner was not aware that he should examine the published notices. He could not forecast with certainty when, if ever, an action would be filed.

In the instant case the land owner, and those having interests therein, knew that ad valorem taxes would be assessed, knew when they would be due, and could forecast with certainty the day, the hour, and place where ad valorem tax foreclosures would occur if the taxes were not paid. Since the Original Sale and Resale occurred in 1953 and 1956, respectively, our references will be to the statutes then in effect, i.e., 68 O.S. 1951, §§ 351, et seq.

68 O.S. 1951, §§ 382, 383, required the County Treasurer to give prior notice of an Original Sale by publication that the sale for delinquent taxes would commence on the first Monday in November in each year, between the hours of 9 A.M. and 4 P.M., at the office of the County Treasurer. A return of the Original Sale was required to be filed with the County Clerk (register of deeds) on or before the last day of November in each year. 68 O.S. 1951, § 386.

In the instant case there were no other bidders at the November, 1953, Original Sale and the County Treasurer bid on the property and acquired for the county a tax lien. 68 O.S. 1951, §§ 388 and 391.

This property remained unredeemed after the November, 1953, Original Sale and it became the duty of the County Treasurer to conduct a Resale on this property on the second Monday in May, 1956. 68 O.S. 1951, § 432. Notice of the Resale was published for four consecutive weeks in an authorized newspaper published in the county stating that the property (describing it and listing the name of taxable owner) would be sold at Resale at the office of the

County Treasurer beginning on the second Monday in May, 1956, between the hours of 9 A.M. and 4 P.M. as required by the statutes. 68 O.S. 1951, §§ 432 b and 432 d. It was at this Resale in 1956 that Garrett and Vaughn entered their bid and acquired their Resale Tax Deed (fee simple title) within 30 days after the Resale. 68 O.S. 1951, § 432 f.

Severe penalties were provided for the County Treasurer if he failed to conduct Original Sales and Resales at the time required by statutory law. 68 O.S. 1951, §§ 432 n, 472 and 475.

It was the duty of the surface owner to attend the County Treasurer's office and pay the 1952 taxes when due on November 1, 1953. 68 O.S. 1951, § 351. If the taxes were not paid by the owner the mineral holders had the right to pay the taxes and assert an equitable lien against the surface owner, Cochran v. Godard, 182 Okl. 506, 78 P. 2d 692, since they had an interest in the land. Jenkins v. Frederick, 208 Okl. 583, 257 P. 2d 1058. As owners of an interest in the land they were required to take note of the taxing statutes and procedures affecting the control or disposition of their interest. Anderson National Bank v. Luckett, 321 U.S. 233, 243, 88 L.Ed. 692, 703. Every person who owns an interest in land in Oklahoma is charged with knowledge that the land is subject to an ad valorem tax, that the land may be sold in the manner provided by law, and is charged with notice of the time and place where such property will be sold. Ponder v. Ebey, 194 Okl. 407, 152 P. 2d 268; 68 O.S. 1951, §§ 432 b and 432d, supra. It follows that the Paschalls and Ross had knowledge that the land was taxable, when the taxes were due, when the property would be sold at Original Sale, that they had a right to redeem prior to Resale, and the time and place of the Resale. They had two years to inquire of the Treasurer whether the taxes had been paid by the surface owner prior to the Resale. Ponder v. Ebey, supra.

Since oil and gas interests in land are not separately taxed on an ad valorem basis the names of the mineral

owners do not appear in the County Treasurer's records. We have held that the Treasurer is not required to search the County Clerk records to ascertain the names of the owners of the land. Herndon v. Pigg, 190 Okl. 402, 124 P.2d 425.

This court and our Legislature has been aware of *Mullane* for several years, and curative measures have been taken where necessary. Bomford v. Socony Mobil Oil Co., Okl., 440 P. 2d 713, and 66 O.S. 1971, § 55, are examples.

The distinction we draw between the cases relied upon by the Appellate Court and the statutory procedures for foreclosing tax liens is well illustrated in Walker v. Hoffman, Okl., 405 P. 2d 57. In Walker v. Hoffman we held that an applicant for a county treasurer's *certificate deed* must give notice to the severed mineral interest holders. *Mullane* clearly applies where an application is made for a treasurer's certificate deed. This is because the timing of the application is left to the applicant and the burden of providing adequate notice and due process is imposed upon the applicant. In Resales the County Treasurer gives notice by publication (to owners who already statutorily know the time and place of the sale) that the land will be sold at the time and place specified by the statute unless the taxes are paid. Thus the publication notice of Resale is supplemental to other action which had conveyed a warning to the owners of interests in the land. The Supreme Court in *Mullane* said this has been the traditional and acceptable use of publication. 339 U.S. at p. 316.

We conclude that Oklahoma's Resale tax sale procedures afford adequate notice and due process where, as here, the land was correctly described in the notices and the statutory procedures were specifically followed.

The judgment of the Appellate Court is reversed. The judgment of the trial court is affirmed.

BERRY, C.J., and WILLIAMS, IRWIN, HODGES, LAVENDER, and BARNES, JJ. CONCUR.

THIS OPINION NOT TO BE CONSIDERED AS PRECEDENT OR AUTHORITY AND NOT FOR PUBLICATION IN THE OFFICIAL REPORTER.

THE COURT OF APPEALS, DIVISON 2
STATE OF OKLAHOMA

FILED
COURT OF APPEALS
OF OKLAHOMA
DEC 6 - 1971
ANDY PAYNE
CLERK

Mary Louise Green Paschall, Individually and as Executrix of the Estate of John N. Paschall, deceased, et al.,

Plaintiffs in Error,

vs. No. 43,907

R. H. Vaughn and R. W. Garrett,

Defendants in Error.

APPEAL FROM THE DISTRICT COURT OF SEMINOLE COUNTY, OKLAHOMA

Honorable Bob Howell, Trial Judge

AFFIRMED AS MODIFIED

William J. Legg
Andrews, Mosburg,
Davis, Elam, Legg
& Kornfeld
Oklahoma City, Oklahoma

Jack Highley
Highley, Highley
and Short
Oklahoma City, Oklahoma For Plaintiffs in Error

[APPENDIX]

Richard S. Roberts
Wewoka, Oklahoma
T. H. Williams, Jr.
Wewoka, Oklahoma — For Defendants in Error

BRIGHTMIRE, P. J.

The single question presented by this appeal is whether Seminole County deprived appellants of Fourteenth Amendment due process of law by failing to give them adequate notice of delinquent tax sale proceedings affecting several mineral interests they owned under a certain forty acres of land located in Seminole County, Oklahoma.

For the purpose of this opinion it is sufficient to say that appellants consist of the personal representatives of the deceased individuals who acquired 15/16th of the mineral interests to the land in question by grant in 1926, and H. Grady Ross who became owner of a 1/16th mineral interest in the same tract the same year. Both mineral deeds were duly recorded in the office of the Seminole County Clerk shortly after execution. Appellants will, for convenience, be referred to as mineral owners.

The mineral owners were named defendants in a suit filed by Christie-Stewart, Inc., an oil and gas lessee of subject property, seeking a judicial determination of the rightful royalty owners as a result of oil production from subject tract. Through various motions, impleading of parties, and pleadings, the dispute in the trial court evolved into one between appellant mineral owners and appellees, R. H. Vaughn and R. W. Garrett, who purchased the acreage during a county tax sale. For convenience the latter two appellees will sometimes be referred to as tax sale purchasers and Christie-Stewart, Inc. as lessee.

Historically, the beginning of the controversy can be traced back to 1952 when the owner of the separate surface interest failed to pay county ad valorem taxes. The County Treasurer included the land in a Wewoka (county

seat of Seminole County) newspaper publication notice of an original sale to be held on the first Monday of November 1953 as required by the governing statutes, 68 O.S. 1951 § 381, et seq. Such statutes did not require other notice to be given to the mineral owners by way of personal service, mailing or posting, and, of course, no such notice was given. Seminole County became the purchaser at the original sale. Following a statutory redemption period, another Wewoka newspaper notice was published of a resale to be held on the second Monday in May 1956. It is stipulated no other notice was attempted or given the mineral owners all of whom lived in Oklahoma but in counties other than Seminole. At resale appellees Garrett and Vaughn, as successful bidders, acquired a resale deed from the county and at trial claimed by reason thereof the entire interest in the land, both surface and mineral rights.

In 1963 lessee acquired an oil and gas lease from the tax sale purchasers and later a separate lease from appellants. A producing well was drilled in 1965. Royalty payments have been suspended pending outcome of this lawsuit.

Based upon these virtually undisputed facts the trial court held that the tax sale proceedings were valid and sufficient to convey appellants' mineral rights to the tax sale purchasers and entered judgment accordingly.

Appellants defended below principally on the theory that they, as record owners of the mineral rights, were deprived of constitutionally sufficient notice of the tax delinquency proceedings and as to them such proceedings were invalid. Consequently appellants, in a cross-petition against the tax deed grantees, asked to have their title to the mineral rights quieted. The trial court declined this request and entered judgment for appellees thus holding the tax sale proceedings were constitutionally valid as to appellants.

In resolving this question we first note that Oklahoma has for many years derived a substantial portion of its income from the production of oil and gas. And the law has long recognized ownership of mineral rights under land as an estate separate from the surface rights. Ramey v. Stephney, 70 Okl. 87, 173 P. 72 (1918). Where there has been a severance of mineral rights, the owner thereof does not lose his right or estate by any length of non-use. Noble v. Kahn, 206 Okl. 13, 240 P.2d 757 (1952). "Oil and gas, while lying in the strata of earth from which they are produced, must be taxed as real property to the owner of the land, if the land is taxable, under which for the time being they may lie." In re Indian Territory Illuminating Oil Co., 43 Okl. 307, 142 P. 997 (1914). Once there is production of oil or gas, however, the mineral estate becomes severed for taxation purposes. Caney Production Co. v. Kane, Okl., 438 P.2d 938 (1967).

It cannot be doubted that state law, both statutory and decisional, is subject to compliance with the applicable provisions of the Federal Constitution as interpreted by the United States Supreme Court. The Fourteenth Amendment provides that no citizen of the United States shall by any state be deprived "of life, liberty, or property, without due process of law."

Basic to due process is a person's entitlement to notice of a proceeding affecting his rights, and a reasonable opportunity to be heard or to protect his interests. In recent years the United States Supreme Court has expanded not only the *scope* of the notice requirement, but has evolved a new approach to the constitutional sufficiency of the *means* of giving the required notice.

In regard to the scope of due process, the requirement of notice extends beyond strictly judicial proceedings. In Wisconsin Electric Power Co. v. City of Milwaukee, 352 U.S. 948, 77 S. Ct. 324, 1 L. Ed. 2d 241 (1956), the Court vacated the judgment of the Supreme Court of Wisconsin with directions to decide the involved notice issue in ac-

cordance with the conclusion reached in Walker v. City of Hutchinson, 352 U.S. 112, 77 S. Ct. 200, 1 L. Ed. 2d 178 (1956). The issue was whether the plaintiff's petition seeking to have a street improvement assessment voided on the ground that the city of Milwaukee had not afforded affected property owners due process of notice of the assessments merely by publishing same in a newspaper in compliance with the applicable provisions of the city charter and ordinances, was good as against a general demurrer. Upon remand the Supreme Court of Wisconsin complied and instructed the trial court:

> "In view of the determination made by the United States supreme court we hold that the constructive notice given by the defendant city by publication of the proposed special assessments against the plaintiff's lands did not meet the requirements of due process. Mullane v. Central Hanover B. & T. Co., 1950, 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865, and Walker v. City of Hutchinson, 1956, 352 U.S. 112, 77 S. Ct. 200, 1 L.Ed.2d 178. Therefore, it was error for the trial court to have sustained the general demurrer interposed to plaintiff's amended complaint." Wisconsin Electric Power Co. v. City of Milwaukee, 275 Wis. 121, 81 N.W.2d 298 (1957).

So far as due process requirements are concerned we can make no substantial distinction between the placing of an assessment lien against one's property and foreclosure of a land tax lien against the interest of one, such as an owner of mineral rights, who has no primary liability for the payment thereof. And this is without regard to the question of what notice due process requires with respect to a tax delinquent surface owner who bears the primary responsibility of paying the assessed ad valorem tax.

The next question is, then, what quality of notice did the Due Process Clause require be given appellants? We think the answer is to be found in a series of cases commencing with Mullane v. Central Hanover Bank & Trust

Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950), wherein the court brushed aside the elusive distinction between "in rem" and "in personam" proceedings and held publication notice due trust beneficiaries whose identities and whereabouts could with due diligence be ascertained, was constitutionally inadequate, and this is so "not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand." The Court recognized the "impracticality, if not the futility" of attempting direct notice to missing or unknown persons, but as to others, giving of notice only by publication is "to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact."

Quite prudently the Court declined to commit itself to a rigid formula for "achieving a balance between" the "interest of the State" and "the individual interest sought to be protected by the Fourteenth Amendment." It did, however, conclude that when "notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

The realistic fault found with publication notice was that "chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here [and in the case at bar], the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention."

Later in City of New York v. New York, New Haven & Hartford R.R. Co., 344 U.S. 293, 73 S. Ct. 299, 97 L. Ed. 333 (1953), the Mullane doctrine was followed with the observation that "Notice by publication is a poor and some-

times a hopeless substitute for actual service of notice. Its justification is difficult at best." Another New York statute providing only for publication and woodland postings of notice in proceedings to acquire a right to divert a stream was struck down in 1962 as constitutionally insufficient in Schroeder v. City of New York, 371 U.S. 208, 83 S. Ct. 279, 9 L. Ed 2d 255, 89 A.L.R.2d 1398 (1962).

A Kansas statute authorizing condemnation of land and proceedings to fix compensation therefor based on "notice" by publication in a local newspaper, was determined to be constitutionally insufficient regarding its notice requirements in Walker v. City of Hutchinson, 352 U.S. 112, 77 S. Ct. 200, 1 L. Ed. 178 (1956), the Court saying: "It cannot be disputed that due process requires that an owner whose property is taken for public use must be given a hearing in determining just compensation. The right to a hearing is meaningless without notice." As was mentioned earlier the rationale of this holding was subsequently applied to street improvement assessment noticing in a Wisconsin case. Wisconsin Electric Power Co. v. City of Milwaukee, supra.

Clearly the United States' highest tribunal is thoroughly committed (with but slight disagreement among the justices) to the abolition of constructive notice in circumstances where some form of actual notice, such as mailing, is reasonably available. This view mirrors language in Walker v. City of Hutchinson, supra, that, "It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property," and that "In too many instances notice by publication is no notice at all."

Appellees argue that to give written notice by mail to the severed mineral owners within this state, and particularly with regard to land in Seminole County would impose an almost insurmountable burden upon the county taxing authorities. While it is true that some additional effort would be required, still we do not think this alone affords

a sound reason for ignoring a fundamental constitutional right. Certainly under an earlier tax statute the problem was avoided by requiring the holder of a certificate tax deed to serve notice of its issuance on all owners of interest in the land. In this connection the Supreme Court of Oklahoma recognized the need for and importance of actual notice to severed mineral owners concerning claims adversely affecting their interests in Walker v. Hoffman, Okl., 405 P.2d 57 (1965), saying:

> "Thus, if the owner of severed minerals may be deprived of his mineral estate without notice of the application for certificate deed, and without notice of an adverse claim to the minerals (occupancy of the surface not being notice of an adverse claim to the minerals, Strickland v. Reeburgh, supra [Okl., 362 P.2d 1110], it would suggest that due process, for lack of notice, has been denied. Lind v. Stubblefield, supra [138 Okl. 280, 282 P. 365]."

Regarding failure to give notice to owners of severed minerals the court in Lind emphasized: "Notice in this connection is analagous to process in the courts; and it is well known that a judgment, even so solemn a document as it is, is absolutely void unless the defendant has been served with process, with personal service, or some substituted service, provided by law. Otherwise he is deprived of his property without due process of law."

Appellees point to the contrary holding in Jenkins v. Frederick, 208 Okl. 583, 257 P.2d 1058 (1952) and Cornelius v. Jackson, 201 Okl. 667, 209 P.2d 166 (1948). These cases were decided, however, before the views of the United States Supreme Court became definitively crystallized and before Walker v. Hoffman, supra. And while the latter case is distinguishable from both Jenkins and Cornelius, the language is so strong and so compatible with the law of the land that we think they would be decided differently today.

In our opinion the conclusion is inescapable that the tax foreclosure proceedings in question were carried out

without constitutional notice to appellants so that they were deprived of an opportunity to appear and protect their mineral interests. We hold, therefore, that insofar as the resale tax deed purports to transfer mineral rights to the land in question to the tax sale purchasers the same is invalid. The judgment of the trial court is accordingly modified by granting appellants judgment on their cross-petition quieting their title to the mineral rights in and under the Southwest Quarter of the Northwest Quarter of Section 29, Township 9 North, Range 7 East, Seminole County, Oklahoma, as against appellees R. W. Garrett and R. H. Vaughn.

Affirmed as modified.

Bacon, J. and Neptune, J. concur.

APPENDIX B

IN THE DISTRICT COURT OF SEMINOLE COUNTY
STATE OF OKLAHOMA.

CHRISTIE-STEWART, Inc, a Corporation, Plaintiff,	)	
-vs-	)	No. 29,092.
WALTER B. PASCHALL, Jr, And JOHN N. PASCHALL, Et Al., Defendants.	)	
R. W. GARRETT AND R. H. VAUGHN, CROSS-DEFENDANTS.	)	

JOURNAL ENTRY OF JUDGMENT.

Heretofore, on September 8, 1969, the above entitled cause came regularly on for trial before the Court: Cross-

Petitioners, R. W. Garrett and R. H. Vaughn, appearing in person and by their attorney, T. H. Williams, Jr., and the substituted Defendants, Zelda Danna Paschall, as Executrix of the Estate of Walter B. Paschall, Jr., deceased and as sole devisee under the will of said deceased defendant, and Mary Louise Green Paschall, as Executrix of the Estate of John N. Paschall, deceased and Mary Louise Green Paschall, Jan Paschall Harden and John N. Paschall, Jr., as sole devisees under the will of said John N. Paschall, a deceased party defendant, and the defendant H. Grady Ross, either appearing in person and or by their Attorneys of record, William J. Legg, of Andrews, Mosburg, Davis, Elam, Legg and Kornfeld, and Jack Highley of Highley and Highley, and all of said parties announced ready for trial, upon the issues reserved in the Journal Entry of Judgment, as made and entered in this cause on June 14, 1965: whereupon the trial of said cause proceeded and all parties introduced their evidence, the Court heard the arguments of said parties, and at the conclusion thereof, granted said parties leave to submit written briefs, and then took the case under advisement.

Now, on this 27th day of October, 1969, said cause coming regularly on for the Court's decision and judgment, pursuant to due notice to all parties of record, and said parties appearing by their Attorneys of record, the court having read and considered the evidence, the written briefs and being fully advised in the premises, FINDS, CONCLUDES AND ADJUDGES AS FOLLOWS:

(1). The resale tax deed dated May 17, 1956, for delinquent taxes for the years 1952-53-54 and 1955, as filed for record June 6, 1956 and recorded in Book 890 Page 577, records of the County Clerk of Seminole County, conveying the:

> Southwest Quarter of the Northwest Quarter of Section 29, Township 9 North Range 7 East, Seminole County, Oklahoma,

unto the Cross-Petitioners herein, R. W. Garrett and R. H. Vaughn, as Grantees, be and the same is hereby decreed to be a valid resale tax deed, based upon full compliance with the tax sale proceedings statutes of the State of Oklahoma, and said deed hereby further decreed to have been executed, filed and recorded, and vested in said Grantees, the fee simple title in and to said lands and premises, as provided by 68 Okla. Stat. 1961, Sec. 432F.

(2). The Court Further Finds, Orders, Adjudges and Decrees that from the date of the recording of said resale tax deed, on June 6, 1956, that said Grantees therein, the Cross-Petitioners, R. W. Garrett and R. H. Vaughn, have been in the open, continuous, visible, notorious, exclusive and hostile possession of said lands and premises, receiving all of the rents, profits and income therefrom, and that said contesting substituted party defendants, are further forever barred and precluded by the statute of limitations, from seeking to assert the invalidity of said resale tax deed, as provided by 12 O.S. 1961, Sec 93(3) and (6).

(3). It is Further Ordered, Adjudged and Decreed by the Court that mineral deeds of record, under whom the above named contesting Defendants, claim title, described as follows:

> Mineral deed, dated July 8, 1926, recorded Book 235 Page 126. August 4, 1926.
> H. Grady Ross, Grantee.
>
> Mineral deed, dated October 10, 1930, recorded Book 443 page 135, December 12, 1932.
> Walter B. Paschall, Grantee,

be and the same are each hereby cancelled and removed from the records of the Seminole County Clerk, as clouds upon the fee simple title vested in said R. W. Garrett and R. H. Vaughn, under and by virtue of said resale tax deed.

(4). It is Further Ordered, Adjudged and Decreed by the Court that the following described oil and gas leases:

Lessor: H. Grady Ross, dated February 18, 1965, recorded February 25, 1965, Book 1064 Page 568.
Lessee: Christie-Stewart, Inc.

Lessors: Walter B. Paschall, Jr., and John N. Paschall, dated March 6, 1965, recorded March 26, 1965, Book 1066 page 193.
Lessee: Christie-Stewart, Inc.

be and the same are each hereby cancelled and removed from the records, as clouds upon the fee simple title of said R. W. Garrett and R. H. Vaughn.

(5). It is Further Ordered, Adjudged and Decreed by the Court that the following described oil and gas lease:

Lessors: R. W. Garrett and wife:
R. H. Vaughn and wife,
Dated November 6, 1963: Recorded November 13, 1963, Book 1045 Page 218,
Lessee: Christie-Stewart Drilling Company,

be and the same is hereby established and confirmed as the valid and existing oil and gas lease on the above described property, to the exclusion of the contesting defendants and all other persons, whomsoever, and that the leasehold estate of said Lessee, and its assignees, under and by virtue of said oil and gas lease is now forever quieted and the title thereto perfected.

(6). IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that the fee simple title in and to the above described land is owned by the Cross-Petitioners, R. W. Garrett and R. H. Vaughn, in equal shares, an undivided one-half interest each, and the title and possession of said parties thereto, and in and to all of the oil, gas and other minerals lying in and under said lands

is hereby perfected, quieted and confirmed as above set forth, and no other persons have any interest, lien, possession or right of possession, and said above named Defendants, as claimants, by inheritance and devise of severed oil, gas and mineral rights in and to said lands, and each of them, in their representative capacities and for themselves, their heirs and assigns, are adjudged and decreed to have no right, title or interest in and to said minerals and mineral rights, and said original Defendants and the substituted party Defendants, and each of them and all persons claiming by, through or under them, or either of them, or their predecessors in the chain of title, be and they are hereby restrained and perpetually enjoined from claiming or asserting any right, title, interest or lien in and to said oil, gas and minerals now and hereinabove forever quieted and confirmed as a perfect fee simple title in said R. W. Garrett and R. H. Vaughn, subject only to the leasehold estate of the Plaintiff herein.

To all of which said Contesting Defendants except in open court and exceptions are allowed.

.....

DISTRICT JUDGE.

APPENDIX C

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

FILED
SUPREME COURT
OF OKLAHOMA
DEC 8 - 1972
ANDY PAYNE
CLERK

CHRISTIE-STEWART, INC., a corporation, Plaintiff,	)	
-vs-	)	No. 43,907
WALTER B. PASCHALL, JR. and JOHN N. PASCHALL, et al, Defendants,	)	
R. W. GARRETT and R. H. VAUGHN, Cross-Defendants.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Mary Louise Green Paschall, Jan Paschal Harden, John N. Paschall, Jr., The Fourth National Bank and Trust Company of Tulsa, Oklahoma, as Executor of the Estate of H. Grady Ross, deceased, and Zelda Danna Paschall, Appellants, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Oklahoma reversing the judgment of the Court of Appeals, Division No. 2 of the State of Oklahoma, and affirming the judgment of the Trial Court, entered on September 26, 1972. This appeal is taken pursuant to Title 28 U.S.C.A. §1257(2).

The Clerk of the Supreme Court of Oklahoma will please prepare a transcript of the record in this case, for transmission to the Clerk of the Supreme Court of the United States and include therein: (A) the full record on

appeal from the Trial Court; (B) all documents, orders, briefs and opinions considered or issued by the Court of Appeals, Division No. 2; (C) all documents, orders, briefs and opinions considered or issued by the Supreme Court of Oklahoma; (D) the writ granting certiorari and order and opinion of the Supreme Court of Oklahoma reversing the judgment of the Court of Appeals, Division No. 2 and affirming the judgment of the Trial Court; and (E) this Notice of Appeal.

The questions presented by this appeal are:

1. Whether the notice requirements of the tax sale statutes of the State of Oklahoma in effect at the time of the purported taking of the mineral rights of Appellants here under consideration (68 Okla. Stat. 1951, §381 et seq) were repugnant to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, the decision of the Supreme Court of Oklahoma being in favor of validity of such state statutes.

2. Whether adequate notice of an Original Tax Sale and a Tax Resale was given Appellants or their predecessors as owners of previously severed mineral rights under lands in the State of Oklahoma, consistent with the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

ANDREWS, MOSBURG, DAVIS, ELAM,
LEGG & KORNFELD

s/ William J. Legg
William J. Legg

s/ Mona S. Lambird
Mona S. Lambird
1800 United Founders Tower
Oklahoma City, Oklahoma 73112

HIGHLEY & HIGHLEY
Hightower Building
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Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that the following who are all parties required by law to be served in the above case, were this day mailed a copy of the foregoing Notice of Appeal to the Supreme Court of the United States, postage prepaid:

Elliott, Woodard & Rolston
Attention: Joe S. Rolston III
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Jack Highley Esq.
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Oklahoma City, Oklahoma 73102

DATED this 4th day of December, 1972.

s/ Mona S. Lambird
Mona S. Lambird

CERTIFICATE OF SERVICE

I hereby certify that the following who are all the parties required by law to be served in the above case, were this day each mailed three copies of the foregoing Jurisdictional Statement, postage prepaid:

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DATED this ..... day of December, 1972.

William J. Legg